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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aesgen, Inc.

Serial No. 76500182

Charles E. Steffey of Schwegman Lundbert Woessner & Kluth,  
P.A. for Aesgen, Inc.

Kim Saito, Trademark Examining Attorney, Law Office 102  
(Thomas V. Shaw, Managing Attorney).

Before Bucher, Drost and Cataldo, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Aesgen, Inc. seeks registration on the Principal  
Register of the mark **PROTORIS** (*in standard character form*)  
for goods identified in the application as follows:

"pharmaceutical preparations for the  
treatment of mucositis and inflammation of  
mucous membranes" in International Class 9.<sup>1</sup>

This case is now before the Board on appeal from the  
final refusal of the Trademark Examining Attorney to  
register applicant's mark based upon Section 2(d) of the

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<sup>1</sup> Application Serial No. 76500182 was filed on March 25, 2003  
based upon applicant's allegation of a *bona fide* intention to use  
the mark in commerce.

Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the mark **PROTEROS** (*in standard character form*), which is registered for, *inter alia*, "herbicides, pesticides, fungicides, all for agricultural, domestic, and commercial uses; dietary/nutritional supplement; preparations for destroying vermin; food for babies" also in International Class 5,<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal, but applicant did not request an oral hearing. We affirm the refusal to register.

Applicant argues that these two marks are not similar as to sound or appearance; that its goods are dissimilar from registrant's identified goods in International Class 5; that the Trademark Examining Attorney has failed to demonstrate that applicant's narrow pharmaceutical niche involves the same trade channels as registrant's dietary/nutritional supplements, for example; and that the cited mark is not particularly distinctive.

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<sup>2</sup> Registration No. 2611116 issued to Torsten Neuefeind, a German citizen, on August 27, 2002, registered under Section 44(e) of the Act based upon German Reg. No. 39836197.

By contrast, the Trademark Examining Attorney argues that the marks are similar as to sound and appearance, that "manufacturers routinely sell both pharmaceuticals and dietary supplements under the same mark," and hence, that consumers encountering applicant's mark and the cited mark in the marketplace are likely to mistakenly believe that the goods derive from a common source.

### **Preliminary matters**

The Trademark Examining Attorney has objected to applicant's list of third-party registrations. She is correct in noting that this Board does not take judicial notice of registrations that reside in the United States Patent and Trademark Office (USPTO), and that a submission of a list of registrations is insufficient to make them of record. In re Duofold Inc., 184 USPQ 638 (TTAB 1974). Third party registrations may be made of record when accompanied by legible, soft copies of the registrations themselves or the electronic equivalent thereof, i.e., printouts of the registrations from the electronic records of the USPTO's automated search system. Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230 (TTAB 1992). Moreover, the record in any application must be complete prior to appeal. 37 C.F.R. § 2.142(d); TMEP § 710.01(c); TBMP §§ 1207.01 et seq. See

also In re Psygnosis Ltd., 51 USPQ2d 1594 (TTAB 1999).

Contrary to applicant's position in its brief, we do not believe justice requires a remand to the Trademark Examining Attorney so that the applicant may submit copies of these third-party registrations. Accordingly, we have given applicant's listing of registrations no consideration in reaching our determination herein.

### **Analysis: Likelihood of Confusion**

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

### **The marks**

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. We must consider whether the marks are similar in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d

1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Although applicant argues that these two marks are not similar, the Trademark Examining Attorney argues that applicant's mark is similar to the registered mark in sound and appearance:

The marks in question could clearly be pronounced the same. Similarity in sound alone may be sufficient to support a finding of likelihood of confusion. RE/MAX of America, Inc. v. Realty Mart, Inc., 207 USPQ 960, 964 (TTAB 1980); Molenaar, Inc. v. Happy Toys Inc., 188 USPQ 469 (TTAB 1975); In re Cresco Mfg. Co., 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv).

Applicant's mark is PROTORIS and Registrant's mark is PROTEROS. The prefix PRO could have the same pronunciation in both marks. The "TOR" portion of PROTORIS and the "TER" portion of PROTEROS could have the same pronunciation given that "TOR" can be pronounced as it is in DOCTOR. The "RIS" portion of PROTORIS and the "ROS" pronunciation of PROTEROS could have the same pronunciation given that "ROS" can be pronounced as it is in RHINOCEROS.

The marks may not only have similar pronunciations, they are visually similar. PROTORIS and PROTEROS have the same consonants in the same order and are separated by single vowels. In addition, both Applicant and Registrant's marks are in typed form. Thus, there are no design elements to aid in distinguishing the marks.

Trademark Examining Attorney's brief, pp. 4 - 5.

While applicant argues that the "different fifth and seventh vowels in both the marks" would "require a substantially different pronunciation for each mark," we agree with the Trademark Examining Attorney that there is no

correct pronunciation of either term. See Kabushiki Kaisha Hattori Tokeiten v. Scuotto, 228 USPQ 461 (TTAB 1985); In re Great Lakes Canning, Inc., 227 USPQ 483 (TTAB 1985); In re Teradata Corp., 223 USPQ 361, 362 (TTAB 1984); and In re Mack, 197 USPQ 755 (TTAB 1977). Additionally, the Trademark Examining Attorney has provided examples of English language words having identically-spelled syllables pronounced in such a way that these two marks could well be pronounced identically. As to appearance, this difference in two similar vowels at the fifth and seventh places in eight-word marks are outweighed by the identical nature of the other six letters. Both marks appear to be coined terms, so there is no apparent difference in connotation. We find that these two marks will create the same commercial impression such that any minor differences in appearance may well be overlooked. Accordingly, this du Pont factor favors the position of the Trademark Examining Attorney.

### The number and nature of similar marks

As to the du Pont factor focusing on the number and nature of similar marks in use on similar goods, applicant argues "that there are thousands of marks registered for use on goods in International Class 005 with the PRO prefix. There are also 21 marks in Class 005 with the ORIS prefix

[sic]. PROTEROS is not a highly distinctive mark."  
(footnotes omitted). However, even if the purported evidence made the case that two separate components comprising the entirety of registrant's mark were both weak in International Class 5 (which it does not),<sup>3</sup> as noted above, we have not considered applicant's listing of third-party registrations, and hence, there is no probative evidence in the record suggesting that this is a weak mark as applied to registrant's goods. Hence, this du Pont factor also favors the position taken by the Trademark Examining Attorney.

### The goods

Accordingly, we turn to the du Pont factor focusing on the relationship of the goods as described in the application and cited registration.

The Trademark Examining Attorney is correct in noting that goods need not be identical in order to support a finding of likelihood of confusion, provided that consumers would believe that there is some relationship between registrant's broadly-identified type of dietary/nutritional

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<sup>3</sup> The prefix "pro-" and the suffix "-oris" do not even comprise the whole of applicant's "Protoris" mark, to say nothing about the final two syllables of registrant's "Proteros" mark: "teros" -- the relevant suffix that one would combine with the prefix "pro-" in order to focus on the strength of the cited mark.

supplement and applicant's more narrowly-identified type of "pharmaceutical preparation."

Applicant notes the breadth of the goods and services in the cited registration.<sup>4</sup> In this context, applicant argues that its narrowly-identified pharmaceutical products are quite different from registrant's identified goods, even those in International Class 5. In further support of its position, applicant cites to the home page of registrant's website,<sup>5</sup> which:

" ... shows that the PROTEROS mark is mainly used in the preparation and three-dimensional structural analysis of proteins for the structure-guided drug design. The registrant is apparently mainly a third party service provider of research services for well-known life science and biotech companies which PROTEROS conducts research on its own account. Applicant strongly reiterates that the registrant's goods should not be

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<sup>4</sup> In addition to the goods listed above in International Class 5, we note that the cited registration contains three other classes of goods and services:

"chemicals used in the biochemical and biotechnological research and development field, namely, chemicals for use in the analysis of the structure and function of proteins and lead compounds; non-natural amino acids" in International Class 1;

"scientific testing apparatus and instruments for the analysis of the structure and function of proteins, namely, specimen holders for the analysis of protein crystals under a humidity controlled environment; computer programs for use in the analysis of the structure and function of protein and lead compounds" in International Class 9; and

"scientific research, laboratory research in the field of chemistry, biochemistry and biotechnology and drug discovery and drug development; computer programming for others" in International Class 42.

<sup>5</sup> <http://www.proteros.de/english/>



construed so broadly as to block registration of applicant's mark."

Applicant argues from this extrinsic evidence that registrant is primarily a third-party provider of research services.

By contrast, the Trademark Examining Attorney claims that applicant's goods are related to registrant's goods. In asserting this, she has taken the position that extrinsic evidence regarding the nature of registrant's actual goods and services may not be used to limit the protection accorded to registrant by its registration.

We agree with the Trademark Examining Attorney. It is well settled that the likelihood of confusion determination must be made on the basis of the identification of goods as set forth in the involved application, compared with the identification of goods contained in the cited registration, rather than on the basis of what the evidence might show the applicant's or registrant's actual goods or services to be. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990) and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In support of her position, the Trademark Examining Attorney included in the record copies of excerpts from

websites on the Internet showing that various supplements are used to treat mucositis:

### **Radiation Therapy Side Effects: Esophagitis and Mucositis**

...

#### *Will radiation therapy change my sense of taste?*

Your sense of taste may change during radiation treatments. Different foods may seem to taste the same, have a slightly bitter taste or not have any taste at all. Despite changes in your sense of taste, it is very important to continue eating well-balanced meals and avoid losing weight.

Foods that are slightly chilled (flavored gelatin, pudding, and applesauce) may be tolerated better.

Meat commonly becomes distasteful after several weeks of treatment. If you are unable to eat meat because it is distasteful, be sure that you have another protein source in your diet. Try eating more fish, poultry, eggs, cheese and milk.

Adding protein supplements to your meal plan usually becomes necessary when your sense of taste changes. A registered dietitian can recommend a supplement brand to meet your nutritional needs.<sup>6</sup>

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### **Herbs & Supplements**

CHAMOMILE -- Other Names: Anthemis nobilis, Genuine chamomile, German Chamomile, Hungarian chamomile, Matricaria chamomilla, Roman Chamomile

Who is this for?

Uses

Note: Many different species of chamomile grow throughout the world. The type commonly available in the United States is known as German chamomile (*Matricaria chamomilla*). It is slightly different from the Roman or English chamomile (*Chamaemelum nobilis* or *Anthemis nobilis*) that is more common in Europe. While these two plants belong to different species, they are closely related and both are used for similar conditions.

In the United States, oral chamomile is used primarily for relaxation and sleep. However, its reputation is based mainly on tradition. Few human studies have been conducted to evaluate chamomile. However, it has shown some sedating and anti-anxiety effects for laboratory animals. In one study, chamomile attached to receptors in the body that are also the targets of prescription sedative medications. Low doses produced a calming effect, while higher doses were more likely to cause sleep.

Chamomile also has antispasmodic effects, which means it may relieve or prevent uncomfortable muscle contractions — especially in the gastrointestinal tract. Therefore, it has also been used to treat minor gastrointestinal complaints

<sup>6</sup>

<http://www.clevelandclinic.org/health/health-info/docs/0600/0610.asp?>

such as gas, motion sickness, and stomach cramps. Bisabolol, one of the chemicals in chamomile has shown antispasmodic activity in studies of laboratory animals. A small study of infants with colic showed that a tea containing chamomile and four other herbal ingredients relieved symptoms of colic about twice as often as a liquid with no active ingredients. All the children in the study were over two weeks old.

Chamomile is also thought to have a soothing effect on the tissues inside the mouth, nose, and throat. Sometimes, chamomile is boiled in water and the steam is inhaled to relieve a stuffy nose or congested chest. A chamomile mouthwash has been tested in clinical studies for the relief of **mucositis** — painful mouth sores that may develop in patients receiving radiation or drug therapy for cancer. Results are conflicting, however. In one study of about 100 cancer patients, a chamomile mouth rinse helped to prevent, delay, or lessen the occurrence of **mucositis**; but no particular benefit was seen in a later study. More research is needed for all of the potential oral uses of chamomile....<sup>7</sup>

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#### **06.10.04 -- Vitamin E Prevents Painful Radiation Therapy Side Effect**

Following surgery, radiation therapy is often the sole treatment for mouth and throat cancers. Inflammation and ulceration of the inside of the mouth, known as **mucositis**, is among the most common negative side effects of radiation therapy to this part of the body. It is often necessary to interrupt radiation therapy when **mucositis** develops because it is extremely painful and can make eating difficult. Interrupted treatments and poor nutrition resulting from the inability to eat can both decrease the likelihood of recovery from cancer. So, prevention and treatment of painful **mucositis** that results from radiation therapy may play an important role in the success of radiation treatments in people with cancer.

By Maureen Williams, ND

Healthnotes Newswire (June 10, 2004) — Taking vitamin E can reduce the likelihood and severity of painful mouth inflammation frequently caused by radiation therapy, according to Head and Neck (2004; 26:313–21). Mouth sores are a common and serious radiation therapy side effect in people being treated for mouth and throat cancers.

Vitamin E is an antioxidant nutrient found in foods such as vegetable oils, nuts, seeds, and whole grains. It prevents and repairs damage to cells in the body caused by oxygen free radicals. Free-radical damage is believed to be the cause of radiation-induced oral **mucositis**. Chemotherapy is also known to cause **mucositis**. Two previous studies have found that vitamin E applied directly to the mouth can speed the healing of **mucositis** in people receiving chemotherapy.

Fifty-four people with cancers of mouth or throat, for whom radiation therapy was the only prescribed treatment, enrolled in the current study. They were randomly assigned to receive either 400 IU of vitamin E two times per day or a placebo containing 500 mg of evening primrose oil two times per day, which was not expected to show any benefit. Participants were instructed to dissolve

<sup>7</sup>

<http://www.drugdigest.org/DD/DVH/HerbsWho/0,3923,4054|Chamomile,00.html>

each capsule and hold the oil in their mouth for five minutes, then swallow, before radiation treatment and again 8 to 12 hours later. This regimen was followed five days per week for seven weeks. At the end of the study, fewer people receiving vitamin E than placebo had experienced painful mucositis: 21.6 versus 33.5%. Furthermore, pain and eating restrictions were significantly less in those receiving vitamin E than in those receiving placebo.

The results of this study show that vitamin E can be useful in preventing and reducing the severity of mucositis, a major side effect of radiation therapy. Vitamin E is an inexpensive addition to a treatment plan for mouth and throat cancers. Comparing the effectiveness of vitamin E to combinations of antioxidants will be helpful in the future.<sup>8</sup>

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### **ANNIEAPPLESEEDPROJECT**

#### **MULTIVITAMIN/VIT E HELPED: BREAST CA CHEMO**

Effect of vitamin B12, folate, and dietary supplements on breast carcinoma chemotherapy -- induced mucositis and neutropenia. Branda RF, Naud SJ, Brooks EM, Chen Z, Muss H. Department of Medicine, University of Vermont, Burlington 05401, USA. [rbranda@zoo.uvm.edu](mailto:rbranda@zoo.uvm.edu)

**BACKGROUND:** Although patients with malignant disease frequently use dietary supplements, the effects of these agents with regard to chemotherapy are unclear.

Therefore, the authors investigated the influence of vitamin B12, folate, and nutritional supplements on chemotherapy-induced toxicity.

**METHODS:** Women with breast carcinoma were asked to complete a questionnaire that recorded their use of dietary supplements. Blood samples were obtained for the assessment of serum vitamin B12 and folate levels before and after the first cycle of chemotherapy and for weekly complete blood counts.

Toxicity was evaluated by measuring absolute neutrophil counts and the frequency and severity of oral mucositis.

**RESULTS:** Of the 49 women who submitted questionnaires, 35 (71%) took a combined total of 165 supplements. Compared with patients in a previous study (performed in 1990), patients in the current study had dramatically increased serum folate levels.

Initial neutrophil count, but not type of chemotherapy, patient age, or serum vitamin B12 level, was predictive of nadir absolute neutropenia and the decrease from initial neutrophil count to nadir (Nfall).

After adjusting for initial neutrophil count, Nfall was found to be lower for women who were taking supplements compared with women who were not taking supplements ( $P = 0.01$ ) and for women who were taking multivitamins ( $P = 0.01$ ) or vitamin E ( $P = 0.03$ ).

Women with serum folic acid levels  $< 20$  ng/mL had a smaller decrease in neutrophil count after chemotherapy than did women with higher folate levels ( $P = 0.04$ ).

<sup>8</sup>

[http://www.nowfoods.com/index.php?action=itemdetail&item\\_id=39292](http://www.nowfoods.com/index.php?action=itemdetail&item_id=39292)

No significant association between oral mucositis and initial neutrophil count, nadir neutrophil count, Nfall, age, vitamin B12 level, or folate level was found.

CONCLUSIONS: The decrease in neutrophil count caused by chemotherapy was ameliorated by dietary supplementation with a multivitamin or vitamin E. In contrast, high serum folate levels were associated with the exacerbation of this decrease in neutrophil count.

Cancer. 2004 Sep 1; 101(5): 1058-64.

PMID: 15329916 [PubMed - indexed for MEDLINE]

Excerpts from the Reuters Health story by Alison McCook:

Women who took a nutritional supplement, a multivitamin or extra vitamin E had a smaller drop in neutrophils, white blood cells that help fight bacterial infections. However, women with relatively high levels of B-vitamin folate had a larger drop in neutrophils.

Study author Dr. Richard F. Branda cautioned that chemotherapy patients should first discuss taking supplements with their doctors, because some supplements may interfere with treatment. For instance, cod liver oil and St. John's Wort may interfere with blood thinning drugs, hormone treatment or chemotherapy.

However, studies have also shown that vitamin E may enhance the benefits and reduce the side effects of chemotherapy, and many doctors now recommend vitamin therapy during treatment.

Remember we are NOT Doctors and have NO medical training.<sup>9</sup>

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These Internet excerpts demonstrate that ongoing studies are being conducted on the therapeutic effects of alternative medicines such as supplements, vitamins and teas on mucositis caused by radiation treatment.

The Trademark Examining Attorney also provided for the record a variety of third-party registrations from entities that have registered the same mark on or in connection with dietary supplements and pharmaceuticals to treat inflammation, including that from mucous membrane diseases:

**RELIANT**

for "house mark for a full line of

<sup>9</sup> <http://annieappleseedproject.stores.yahoo.net/mulehelbreas.html>

## PHARMACEUTICALS

preparations for the prevention and treatment of human diseases and disorders, namely allergy medications, analgesics, anti-infectives, anti-neoplastics, cardiovascular pharmaceuticals, **dietary supplements**, gastro-intestinal treatment preparations, pharmaceutical preparations **for the prevention and treatment of human metabolic disorders**, neurotherapeutic pharmaceuticals, respiratory pharmaceuticals, skin and **mucous membrane pharmaceuticals**, hormones and endocrinological pharmaceuticals, blood modifiers and nasal and otic pharmaceuticals" in International Class 5;<sup>10</sup>



for "pharmaceutical and biopharmaceutical preparations for the prevention and treatment of human diseases and disorders, namely allergy medications, analgesics, anti-infectives, anti-neoplastics, cardiovascular pharmaceuticals, **dietary supplements**, gastro-intestinal treatment preparations, pharmaceutical preparations **for the prevention and treatment of human metabolic disorders**, neurotherapeutic pharmaceuticals, respiratory pharmaceuticals, skin and **mucous membrane pharmaceuticals**, hormones and endocrinological pharmaceuticals, blood modifiers and nasal and otic pharmaceuticals in International Class 5.<sup>11</sup>

## PERNATON

for "dietary products for medical use, namely, **dietary supplements**, vitamins, minerals, amino acids, enzymes, glucosamine complex, chondroitin complex, and herbal extracts, all for helping to maintain mobility of joints and for use in the treatment of joint pain and **inflammation**, sprains, strains, muscle fatigue, sports injuries, muscle cramps, tennis elbow, leg cramps, backache, rheumatic discomfort, sciatica, lumbago, arthritis, muscle ache, cellulite, migraines and headaches, skin irritation and insect bites, **pharmaceutical preparations** for helping to maintain mobility of joints and for use in the treatment of

<sup>10</sup> Registration No. 2669624 issued on December 31, 2002, claiming first use anywhere and first use in commerce at least as early as July 2002. The word "Pharmaceuticals" is disclaimed apart from the mark as shown.

<sup>11</sup> Reg. No. 2664070 issued on December 17, 2002 claiming first use anywhere and first use in commerce at least as early as January 2000.



joint pain and **inflammation**, sprains, strains, muscle fatigue, sports injuries, muscle cramps, tennis elbow, leg cramps, backache, rheumatic discomfort, sciatica, lumbago, arthritis, muscle ache, cellulite, migraines and headaches, skin irritation and insect bites" in International Class 5;<sup>12</sup>

for "pharmaceuticals, preparations for the treatment of acne, anemia, arthritis, asthma, bacterial infections, cold and cough, constipation, dandruff, diarrhea, diseases of the central nervous system, fever, fungal infections, hemorrhoids, herpes, heartburn, **inflammation**, intestinal gas, migraines, nasal and sinus congestion, nausea, poor respiration, respirator infections, sore throat, stomach ache, mouth pain caused by teething; and muscle pain; pharmaceutical preparations for the prevention of acne, anemia, arthritis, asthma, bacterial infections, cold and cough, constipation, dandruff, diarrhea, diseases of the central nervous system, fever, fungal infections, hemorrhoids, herpes, heartburn, **inflammation**, intestinal gas, migraines, nasal and sinus congestion, nausea, poor respiration, respiratory infections, sore throat, stomach ache, mouth pain caused by teething, and muscle pain; amino acids for use as nutritional supplements; anesthetic for surgical purposes; topical anesthetics; anesthetics for non-surgical use; antibiotics; antibiotic creams; antibiotic ointments; antibiotic tablets; antihistamines and antihistamine combinations in the nature of cold and allergy remedies; calcium supplements for the treatment of osteoporosis; calcium supplements for the prevention of osteoporosis; cardiovascular pharmaceuticals; contraceptive forms; contraceptive sponges; oral contraceptives; dental needs, namely medicated mouthwash; dental needs, namely dental abrasives; dental needs, namely dental amalgams; dental needs, namely dental bleaching gels, dental needs, namely dental impression materials; dental needs, namely medicated tooth paste; room deodorants; diagnostic reparations for clinical or medical laboratory use; diaper rash ointment; diet aids, namely diet capsules and diet pills; electrolyte replacement solutions; electrolyte replacement tablets; enzymes for use as a

<sup>12</sup> Reg. No. 2384662 issued on September 12, 2000 under Section 44(e) of the Act based on Swiss Reg. No. 421977.

dietary supplement; eye drops; eye ointments; medicated foot powder; medicated hair growth stimulants; non-medicated hair growth stimulants; gel for use as personal lubricant; pregnancy test kits for home use; medicated hair shampoo; medicated skincare preparations; sleep aids namely sleeping pills and tablets; vaginal preparations, namely anti- fungals; medicated nailcare and nosecare preparations; and nutraceutical, **herbal and dietary supplements**" in International Class 5;<sup>13</sup>

## VISIONQUEST

for "vitamins, mineral **supplements**, herbal supplements, nutraceutical formulations, and homeopathic **pharmaceuticals** for use in supporting the body for optimal health and longevity, for use in stimulating the body's natural defense systems, for use to control weight and for use in the treatment of colds, flu, sinus problems, pain relief, allergies and hay fever, cough and bronchial problems, diarrhea, **inflammation**, arthritis, injuries and trauma, gastrointestinal problems, depression, chronic fatigue, stress, heart and arterial disease, sexual dysfunction, irritability, thymus malfunction, urinary problems, sleeplessness, hormonal imbalance, infections, anti-aging, weight gain, muscle tone; and medicated skin care preparations" in International Class 5;<sup>14</sup>

## FLORA VERA

for, *inter alia*, "pharmaceutical preparations for the treatment of aches and pains, acid reflux, acidity, acne, allergic conditions, anemia, anxiety, arthritis, asthma, athlete's foot, blood and circulation problems, blood pressure, breath odor and halitosis, bronchitis, bruises and sprains, congestion, constipation, coughs, cramps, dandruff, dental plaque, depression, dermatitis, diabetes, diaper rash, diarrhea, digestive problems, ear infection, eczema, exhaustion, fevers, gastritis, gynecological problems, hair loss, hay fever, head lice, headaches and migraines, heart blood and circulation problems, heartburn, hemorrhoids, high blood pressure, high cholesterol, hyperactivity, weak immune system, **inflammation**, insect stings and bites, insomnia, nausea and

<sup>13</sup> Reg. No. 2633870 issued on October 15, 2002, claiming use anywhere at least as early as July 1996 and use in commerce at least as early as December 1996.

<sup>14</sup> Reg. No. 2679475 issued on January 28, 2003, claiming use anywhere at least as early as November 1, 1998 and use in commerce at least as early as March 1, 1999.



vomiting, premenstrual syndrome, psoriasis, seborrheic dermatitis, sinusitis, sore throat; sunburn, teething, tension, sore throat tonsillitis, ulcers, urinary incontinence, urinary tract infection, and warts; **dietary supplements** adapted for medical use" in International Class 5;<sup>15</sup>

## PHYTOSYNERGIST

for "pharmaceutical, herbal, medicinal and homeopathic preparations for general well-being and therapeutic applications for treating a variety of conditions, namely, migraines and headaches, coughs and colds, influenza, acute upper respiratory tract infections and **inflammations**, and other respiratory problems, acute sinusitis, chronic rhinitis, chronic bronchitis, bronchial congestion, pleurisy, tonsillitis, laryngitis, asthma, allergic conditions, skin conditions, urticaria, eczema, psoriasis, acne, boils, gout, rheumatoid arthritis and other chronic **inflammatory conditions**, liver function disorders, urinary tract infections and **inflammatory conditions**, and other urinary tract conditions, cystitis, dysfunctional uterine bleeding, uterine prolapse, menopausal symptoms, painful menstruation, intestinal problems, gastric ulcer, duodenal ulcer, gastritis, gastric hyperacidity, gastric reflux, poor digestion, colic, food intolerances, irritable bowel, flatulence, bad breath, stress, anxiety, sleeping disorders, physical exhaustion, debility, anaemia and chronic fatigue syndrome; analgesics; anti-infectives, antibiotics, antivirals; antiparasitics; antiseptics; medicated skincare preparations; antidepressants; vitamins; dietary, food, herbal, mineral and **nutritional supplements**; food for medically restricted diets; herbal teas for medicinal purposes" in International Class 5;<sup>16</sup>

## HEALTHA2Z

for "pharmaceutical preparations for the treatment of acne, anemia, arthritis, asthma, bacterial infections, cold and cough, constipation, dandruff, diarrhea, diseases of the central nervous system, fever, fungal infections, hemorrhoids, herpes, heartburn, **inflammation**, intestinal gas, migraines,

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<sup>15</sup> Reg. No. 2528509 issued on January 8, 2002 claiming use anywhere and use in commerce at least as early as September 1, 2000.

<sup>16</sup> Reg. No. 2784649 issued on November 18, 2003, claiming use anywhere at least as early as July 14, 1995 and use in commerce at least as early as January 29, 2001.

nasal and sinus congestion, nausea, poor respiration, respiratory infections, sore throat, stomach ache, mouth pain caused by teething; and muscle pain pharmaceutical preparations for the prevention of acne, anemia, arthritis, asthma, bacterial infections, cold and cough, constipation, dandruff, diarrhea, diseases of the central nervous system, fever, fungal infections, hemorrhoids, herpes, heartburn, **inflammation**, intestinal gas, migraines, nasal and sinus congestion, nausea, poor respiration, respiratory infections, sore throat, stomach ache, mouth pain caused by teething, and muscle pain; amino acids for use as nutritional supplements; anesthetic for surgical purposes; topical anesthetics; anesthetics for non- surgical use; antibiotics; antibiotics; antibiotic creams; antibiotic ointments; antibiotic tablets; antihistamines and antihistamine combinations in the nature of cold and allergy remedies; calcium supplements for the treatment of osteoporosis; calcium supplements for the prevention of osteoporosis; cardiovascular pharmaceuticals; contraceptive foams; contraceptive sponges; oral contraceptives; dental needs, namely medicated mouthwash; dental needs, namely dental abrasives; dental needs, namely dental amalgams; dental needs, namely dental bleaching gels; dental needs, namely dental impression materials; dental needs, namely medicated tooth paste; room deodorants; diagnostic preparations for clinical or medical laboratory use; diaper rash ointment; diet aids, namely diet capsules and diet pills; electrolyte replacement solutions; electrolyte replacement tablets; enzymes for use as a dietary supplement; eye drops; eye ointments; medicated foot powder; medicated hair growth stimulants; non-medicated hair growth lubricant; gel for use as personal lubricant; pregnancy test kits for home use; medicated hair shampoo; medicated skincare preparations; sleep aids, namely sleeping pills and tablets; vaginal preparations, namely anti-fungals; medicated nailcare and nose care preparations; and nutraceuticals for use as **dietary supplements**; and herbal supplements" in International Class 5;<sup>17</sup>

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<sup>17</sup> Reg. No. 2805770 issued on January 13, 2004 claiming use anywhere and use in commerce at least as early as February 13, 2001.

**SPRAYOLOGY**

for "homeopathic preparations for the treatment of respiratory conditions, skeletal and connective tissue conditions, digestive and intestinal conditions, low libido, symptoms of aging, poor memory, menopausal conditions, menstruation conditions, skin conditions, emotional stress conditions, organ therapy, **inflammation**, environmental pollution and detoxification conditions, pain and neuralgia, weight control, insect bites, jet lag, all for human use dietary **supplement preparations** for the delivery of vitamins and minerals; all for human use" in International Class 5;<sup>18</sup>

These third-party registrations, which are based on use in commerce, and which individually cover a number of different items, provide some support for the Trademark Examining Attorney's position that dietary/nutritional supplement and pharmaceutical preparations for the treatment of mucositis are related because they show that these goods have been registered by the same source under the same mark. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

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<sup>18</sup> Reg. No. 2891401 issued on October 5, 2004 claiming use anywhere and use in commerce at least as early as March 1, 2000.

We must deem the registrant's goods to include dietary/nutritional supplements that might be directed to the treatment of mucositis and inflammation of mucous membranes. From these third-party registrations, we conclude that pharmaceutical preparations as well as certain dietary/nutritional supplements are used to treat inflammation, including the inflammation of mucous membranes. As argued by the Trademark Examining Attorney, it appears as if some entities have applied the same mark to pharmaceuticals and supplements. While the category of "pharmaceutical preparations" (applicant's goods) may not overlap with "dietary/nutritional supplements" (registrant's goods), they are clearly related goods.

Accordingly, given the relationship of these goods as potentially alternative treatment methods for mucositis and inflammation of mucous membranes, this du Pont factor favors the position taken by the Trademark Examining Attorney.

### Channels of Trade

As to the du Pont factor focusing on the similarity or dissimilarity of established, likely-to-continue trade channels, it is clear from the third-party registrations that some of the same manufacturers apply the same mark to ethical pharmaceuticals and supplements. Even if not the

same, it must be presumed that they move in all appropriate channels of trade and to all appropriate customers for those goods as identified, and hence could be sold in the same retail outlets, e.g., drugstores, and purchased by the same class of persons, i.e., purchasers of medical preparations for the treatment of mucositis and inflammation of mucous membranes. If these purchasers were to encounter the products under the same or similar marks, it would not be unreasonable for them to assume, mistakenly, that they originate from the same source. In re Elbaum, 211 USPQ 639 (TTAB 1981). Hence, this factor too favors the position taken by the Examining Attorney.

### Conditions of Sale

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, i.e., "impulse" versus careful, sophisticated purchasers, applicant contends that inasmuch as "purchasers from Registrant must be careful to avoid confusing Registrant's PROTEROS rat poisons from PROTEROS baby food," ... "it is axiomatic that such purchasers would be capable of distinguishing PROTORIS pharmaceuticals for the treatment of mucositis and inflammation of mucous membranes from PROTEROS dietary/nutritional supplements."

However, the issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source of those goods. See In re Rexel Inc., 223 USPQ 830, 831 (TTAB 1984), and cases cited therein. In fact, the principles of likelihood of confusion that have developed under the Lanham Act are not designed to prevent the situation where a small child wants baby food and the caregiver inadvertently offers her rat poison bearing the same house mark.<sup>19</sup> Rather, the issue we are faced with is the likelihood that the consumer who knows of registrant's supplements - but has an imperfect recollection of the exact spelling of registrant's coined mark - may mistakenly assume that applicant's ethical pharmaceuticals originate with registrant.

On the other hand, a very different approach to the discussion of the conditions under which sales are made is to assume that when ethical pharmaceuticals are involved, the consequences of confusion are so drastic that a mark should not be registered if there is any chance for confusion. In this case, we must assume that the customers for those goods, as identified, would be

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<sup>19</sup> "Is there anyone among you who, if your child asks for bread, will give a stone? Or if the child asks for a fish, will give a snake?"

-- **Matthew 7:9-10**

ordinary consumers, having imperfect recollection and unable to compare these marks on a side-by-side basis. Without entering into the debate over the correctness of a "doctrine of greater care" for pharmaceuticals, in which case one would apply a lesser quantum of proof in reaching a finding of likelihood of confusion, adopting this approach would certainly tilt the balance on this du Pont factor more steeply in favor of the position taken by the Trademark Examining Attorney.

### Conclusions

In conclusion, two key considerations support the conclusion that there is a likelihood of confusion herein, namely, applicant's mark is quite similar to registrant's mark and the respective goods are deemed to be related.

*Decision:* The refusal to register under Section 2(d) of the Act is hereby affirmed.